

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 DAVID RICE and ELIZABETH RICE,
10 individually and as a marital community,
11 and SETH DONAHUE,

12 Plaintiffs,

13 v.

14 CITY OF ROY, a Washington
15 municipality, CHRIS JOHNSON,
16 individually, and DARWIN ARMITAGE,
17 individually,

18 Defendants.
19

CASE NO. 3:20-cv-05223 RJB

ORDER ON PARTIES'
DISCOVERY MOTIONS

20 THIS MATTER comes before the Court on the Defendants' Motion to Compel (Dkt. 62)
21 Defendants' Motion for Protective Order re: Officer Johnson's Pre-Employment File (Dkt. 68)
22 and Plaintiffs' Motion to Reopen Discovery (Dkt. 70). The Court has reviewed the pleadings
23 filed regarding the motions and the remaining file.
24

25 This case arises from a police officer involved shooting just south of the Roy,
26 Washington city limits in February of 2019. Dkt. 1. Trial in the case is set to begin on August
27 23, 2021. Dkt. 16.

1 **FACTS**

2 The Plaintiffs allege that David Rice and his nephew, Seth Donahue, were driving a
3 moving utility vehicle (“UTV”) southbound on a set of railroad tracks and City of Roy Police
4 Officer Chris Johnson lit up his vehicle’s spotlight and, without warning, began shooting at
5 them. Dkt. 1. Plaintiffs Rice and Donahue make federal claims for violation of their Fourth and
6 Fourteenth Amendment rights to be free from unreasonable seizures, arrest without probable
7 cause, and the excessive use of force. *Id.* They make state law claims for negligence, false
8 arrest, battery, and emotional distress. *Id.* Plaintiff Elizabeth Rice makes claims for violation of
9 her Fourteenth Amendment rights and loss of consortium. *Id.* The Plaintiffs seek damages,
10 attorneys’ fees and costs. *Id.*

11 In the June 10, 2020 case scheduling order, the expert disclosure deadline was February
12 24, 2021 and the discovery deadline was April 26, 2021. Dkt. 16. By order of the Court, the
13 expert disclosure deadline was extended to May 7, 2021 and the discovery deadline was
14 extended to June 18, 2021. Dkts. 36 and 46. The parties now file three discovery motions
15 regarding discovery issues which they contend they cannot resolve.

16 **DISCUSSION**

17 Under Fed. R. Civ. P. 26(b)(1),

18 Parties may obtain discovery regarding any nonprivileged matter that is relevant to
19 any party’s claim or defense and proportional to the needs of the case, considering
20 the importance of the issues at stake in the action, the amount in controversy, the
21 parties’ relative access to relevant information, the parties’ resources, the
importance of the discovery in resolving the issues, and whether the burden or
expense of the proposed discovery outweighs its benefit. Information within this
scope of discovery need not be admissible in evidence to be discoverable.

22 Under Fed. R. Civ. P. 26(b)(2)(C),

23 On motion or on its own, the court must limit the frequency or extent of discovery
24 otherwise allowed by these rules or by local rule if it determines that:

1 (i) the discovery sought is unreasonably cumulative or duplicative, or can be
2 obtained from some other source that is more convenient, less burdensome, or less
expensive;

3 (ii) the party seeking discovery has had ample opportunity to obtain the
4 information by discovery in the action; or

5 (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

6 **Defendants' Motion to Compel Plaintiffs to Participate in Psychiatric IMEs.** "The
7 court where the action is pending may order a party whose mental or physical condition . . . is in
8 controversy to submit to a physical or mental examination by a suitably licensed or certified
9 examiner." Fed. R. Civ. P. 35(a)(1).

10 The Defendants' motion to compel the Plaintiffs to participate in psychiatric IMEs (Dkt.
11 62) should be granted. There is good cause for the examination and the Plaintiffs have put their
12 mental health at issue.

13 Pursuant to Rule 35(a)(2)(B), this order must specify the "time, place, manner, conditions
14 and scope" of the examination. Accordingly, at a mutually agreeable time, but no later than three
15 weeks from the date of this order, the Plaintiffs should participate in a remote (on a platform like
16 Zoom)(unless they can agree to an in-person examination) 90-minute psychiatric examination
17 with the Defendants' rebuttal expert Dr. Paul Ciechanowski. As proposed by the Defendants, the
18 examination should explore current and past behavioral health issues and symptoms, social and
19 developmental history, medical history, current and past medications, and potentially include
20 some psychological testing.

21 **Defendants' Motion for a Protective Order Regarding Officer Johnson's Pre-**
22 **Employment Records.** Pursuant to Rule 26(c)(1)(A), for good cause, the court may "issue an
23 order to protect a party or person from . . . oppression, or undue burden or expense, including . . .
24 forbidding the disclosure or discovery . . ."

1 On February 16, 2021, the Defendants served Plaintiffs with a privilege log related to the
2 employment materials that are the subject of this motion. Dkt. 69-2. The sought-after pre-
3 employment records include Officer Johnson's application, criminal history report, polygraph,
4 and psychological examination. *Id.* On June 18, 2021 (the last day for discovery and related
5 motions), Plaintiffs' counsel contacted Defense counsel and indicated that he wanted the pre-
6 employment materials. Dkt. 69, at 2. (In their response, the Plaintiffs state that they also seek a
7 copy of the post shooting psychological evaluation of Officer Johnson by Dr. Thomas Petak.
8 Dkt. 86.) That same day, the Defendants filed the instant motion for a protective order. Dkt. 68.

9 The Court ordered the records be provided to it for in-camera review. Dkt. 99. Those
10 materials were reviewed and will be filed under seal in the record.

11 The Defendants' motion protecting Officer Johnson's pre-employment records (Dkt. 68)
12 should be granted, in part, and denied, in part. They have shown good cause for an order
13 protecting Officer Johnson's criminal history report, the polygraph and psychological
14 examination. Rule 26(c)(1)(A). The Defendants assert that the materials at issue are protected
15 by the executive privilege. Dkt. 68. "[W]hen an executive privilege is asserted, the courts must
16 balance the public interest in the confidentiality of governmental information against the needs
17 of a litigant to obtain data, not otherwise available to him, with which to pursue a non-frivolous
18 cause of action." *See Elliott v. Webb*, 98 F.R.D. 293, 296 (D. Idaho 1983). The Defendants have
19 shown a substantial need in keeping the records confidential – to avoid having applicants be less
20 than candid in their applications and psychological evaluation. While the Plaintiffs assert that
21 these documents may be relevant to their claims, a review of the criminal history report, the
22 polygraph and the psychological evaluation demonstrates that they contain no information
23 relevant to the Plaintiffs' claims. The Defendants further point out that in all but one case cited
24

1 by Plaintiffs, the courts ordered disclosure of psychological examination reports done after a
2 shooting because the examinee would know the results would be shared and had no expectation
3 of privacy in them. In their reply, the Defendants state that Dr. Petak gave Chief Armitage the
4 results of the post shooting examination by telephone and that there is no written report.

5 The Plaintiffs have not shown good cause for protection of Officer Johnson's application.
6 While some of the information is identifying information, there is no showing that with some
7 redaction, that document should not be turned over.

8 The Defendants' motion to protect Officer Johnson's pre-employment records (Dkt. 68)
9 should be granted as to Officer Johnson's criminal history report, the polygraph and
10 psychological examination, and denied as to his application. To the extent that the Defendants
11 move to protect Dr. Petak's written report of Officer Johnson's post-shooting examination, that
12 motion should be denied without prejudice. There is no known written report to protect.

13 **Plaintiffs' Motion to Reopen Discovery and Allow the Testimony of Neil Bennett**
14 **and Joseph Anderson.** Pursuant to Fed. R. Civ. P. 16(b)(4) the court may modify a case
15 scheduling order for good cause.

16 The Plaintiffs' Motion to Reopen Discovery and Allow the Testimony of Neil Bennett, an
17 economic impact analyst, and a rebuttal expert, Dr. Joseph Anderson, a toxicologist (Dkt. 70)
18 should be denied. The Plaintiffs disclosed Mr. Bennett as an expert witness on June 7, 2021 and
19 disclosed his report on June 9, 2021, well beyond the May 7, 2021 expert witness disclosure
20 deadline. Additionally, while the Plaintiffs timely disclosed rebuttal expert Dr. Anderson, his
21 report was not produced until July 2, 2021, well past the discovery deadline. The Plaintiffs have
22 failed to show good cause for these late disclosures. While the parties have agreed to do some
23 depositions after the discovery deadline, the Defendants have shown that they are prejudiced by
24

1 the late disclosure of Mr. Bennett and by the late report of Dr. Anderson. The Plaintiffs' motion
2 should (Dkt. 70) be denied.

3 **IT IS SO ORDERED.**

4 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
5 to any party appearing *pro se* at said party's last known address.

6 Dated this 7th day of July, 2021.

7
8 

9 ROBERT J. BRYAN
10 United States District Judge
11
12
13
14
15
16
17
18
19
20
21
22
23
24